



# STATE OF INDIANA

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November 5, 2015

Mr. Tyrone Frazier #910476  
Indiana State Prison  
One Park Row  
Michigan City, Indiana 46360

*Re: Formal Complaint 15-FC-254; Alleged Violation of the Access to Public Records Act by the Marion Superior Court*

Dear Mr. Frazier,

This advisory opinion is in response to your formal complaint alleging the Marion Superior Court ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Court has responded via Mr. Richard McDermott, Esq., Assistant Corporation Counsel. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 19, 2014.

## BACKGROUND

Your complaint dated September 6, 2015 alleges the Marion Superior Court violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

You requested an audio recording of the pretrial conference held on November 29, 1989 and the sentencing hearing on February 12, 1991. On August 26, 2015 Magistrate Flannelly denied your request. She stated any records you requested are no longer kept by the Circuit Court. The original analog tapes are held at off-site storage. Further, the court no longer has the necessary systems to copy an analog tape and does not authorize the release of the original tapes.

In his response for the court, Mr. McDermott reasserts the previous denial. He also notes you included an affidavit of indigence. Because you will not pay the fees associated with preparing the document, Mr. McDermott contends the refusal was valid.

## ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” See Ind. Code § 5-14-3-1. The Marion Superior Court is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Court’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

The Court has stated the record is in off-site storage. Therefore, the Court does not have to provide the record. It matters not whether the record is off-site or housed in an archive, the Court is the custodian of the record and has the obligation to fulfill a public records request. Nevertheless, Ind. Code § 5-14-3-3 states:

a public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system.

To balance this consideration, Ind. Code § 5-14-3-8(e)(2) provides:

if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record.

The APRA does require a public agency to make reasonable efforts to fulfill a request. The Court has stated it would cost the Court more to obtain the tape and convert it to an accessible format than it would recoup from charging for the record. If not for your status as a Department of Correction inmate, the Court would be obligated to retrieve the recording from storage and allow you to listen to it. That being said, if you are able to arrange such an outing with DOC and the Court, you may do so. Any such endeavor would be a consideration for DOC and not this Office.

As for the matter of fees, you have included an affidavit of indigency. The Access to Public Records Act does not have a provision for indigence. Therefore, the Court can request copy fees before providing records to you, regardless of your status as a current or former criminal litigant. Trial rules regarding indigency would not apply to public records requests. Therefore, if you wish to receive your records, you will have to provide payment.

## **CONCLUSION**

It is the Opinion of the Public Access Counselor the Marion Superior Court did not violate the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Richard McDermott, Esq.